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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

In re A.W, a Person Coming Under the Juvenile  
Court Law.

TUOLUMNE COUNTY DEPARTMENT OF  
SOCIAL SERVICES ,

Plaintiff and Respondent,

v.

A.W.,

Defendant and Appellant.

F078389

(Super. Ct. No. JV7910)

**OPINION**

**THE COURT\***

APPEAL from orders of the Superior Court of Tuolumne County. Donald I.  
Segerstrom, Jr., Judge.

Alexis Collentine, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Sarah Carrillo, County Counsel, and Cody M. Nesper, Deputy County Counsel,  
for Plaintiff and Respondent.

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\* Before Poochigian, Acting P.J., Detjen, J. and Peña, J.

Alyssa W. (mother) appeals the juvenile court's jurisdictional and dispositional findings and orders as to her now one-year-old son, A.W. Following a contested dispositional hearing in October 2018, the juvenile court exercised its dependency jurisdiction under Welfare and Institutions Code section 300, subdivision (b)(1) (failure to protect)<sup>1</sup> and ordered A.W. placed in mother's custody under family maintenance services. Mother contends there was insufficient evidence to support the court's jurisdictional finding because there was no current risk to A.W. either by her substance abuse or A.W.'s contact with her boyfriend, who is a registered sex offender. Because the jurisdictional finding was error, she further contends, the court erred in not dismissing the case. We affirm.

### **PROCEDURAL AND FACTUAL SUMMARY**

In February 2018, the Tuolumne County Department of Social Services (department) received a report that mother tested positive for methamphetamine at 36 weeks gestation during a prenatal appointment and was admitted to the hospital for preeclampsia. She admitted using methamphetamine on February 6, 2018, approximately a week before. After a week in the hospital, she was induced and gave birth to A.W. A.W.'s umbilical cord blood tested negative for methamphetamine. Mother did not have baby supplies and a car seat and refused to give her home address to hospital staff. Her boyfriend, Nathan O., a registered sex offender, was present at the hospital. He had been convicted of possession of child pornography and sexual exploitation of a child (Pen. Code, §§ 311.11, subd. (c)(1) & 311.3, subd. (a)) for possessing over 600 sexually explicit images of minors. Mother had a history of depression and bipolar disorder. She told the reporting party, "People would be better off without me."

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<sup>1</sup> Unless otherwise indicated, statutory references are to the Welfare and Institutions Code.

Mother told social workers at the hospital her situation was a “fluke” as she did not have a significant substance abuse history. She was stressed that her ex-husband, Jacob W., was trying to reduce her visitation with her children, Trinity and Julius. She used methamphetamine on February 6 because she did not want to feel anything. She said she was going to school to become a dental hygienist, was participating in counseling and had been offered a low-income apartment that would be available in approximately two weeks. She did not have a relationship with A.W.’s father, Christopher H. She lived with him prior to her pregnancy but he was a drug addict and their relationship was toxic. When she told him she was pregnant in June 2017, he threatened suicide and she moved back to Sonora to be closer to her mother. Since she moved back, she had been “couch surfing” and staying with her mother during visits with Trinity and Julius. She used methamphetamine twice a week in 2016 until January 2017.

Mother relied on Nathan for emotional support. She knew about his child pornography conviction and was “ ‘torn’ ” about their “ ‘friendship.’ ” She did not allow him around her children. However, he supported her in her mental health treatment. She had battled depression since she was 14 years old and was taking medication to treat it. She saw a counselor twice a month and a psychiatrist every six weeks. She denied being suicidal, stating “ ‘I’m too pathetic to attempt suicide.’ ”

On February 14, 2018, the day of mother’s discharge from the hospital, social workers met with her in her hospital room. The maternal grandmother was also present. They discussed mother’s relationship with Nathan and the risk it posed to A.W. Mother disagreed there was a risk but said she ended their relationship. The participants were also concerned that she used methamphetamine during her third trimester. They agreed the department would file a juvenile dependency petition but not seek detention. Mother agreed to a safety plan that required her to live with her mother until her apartment was ready, have no contact with Nathan, and continue in therapy and psychiatric treatment.

Two days later, mother reported A.W. was doing well. She received confirmation she was accepted into a low-income apartment. The social worker expressed her concern that Nathan resided in the same apartment complex and asked if she understood she was not to have any contact with him. Mother asked if telephone contact was permitted and was told no contact at all. She said Christopher was homeless, and she did not have any contact with him. She ended her relationship with him in November 2016 but dated him intermittently until July 2017. She said she was “ ‘never a heavy user.’ ” [both live at Jamestown apartments]) However, during another conversation mother was unable to provide details about her substance abuse. She said she first tried methamphetamine in May 2016 and used “ ‘off and on’ ” but could not say how much she used. She said her use on February 6 was the only time she used during her pregnancy. She did not know why she would jeopardize her baby and said she would discuss it with her counselor.

In March 2018, mother met with a social worker. She said she had moved into the apartment and was employed as an on-call dental assistant. In early April 2018, mother signed a family maintenance plan that required her to participate in mental health services, submit to random drug testing and attend twice weekly Alcoholics Anonymous/Narcotics Anonymous (AA/NA) meetings.

In May 2018, the department was notified A.W. was examined by a public health nurse who determined he was underweight and had mucous and blood in his stool. Mother reportedly refused services, which she denied. She explained she had a conflicting appointment and had to reschedule the appointment with the public health nurse. She said the mucous and blood in A.W.’s stool was an adverse reaction to her breast milk and she had stopped breast feeding. She claimed not to have seen Nathan since he was at the hospital during A.W.’s birth.

On May 24, 2018, the Tuolumne County Sheriff’s Office went to mother’s apartment and found Nathan there. He was arrested for having contact with her daughter, which was a violation of his probation. Sheriff’s deputies and probation

officers had been to mother's home on several occasions looking for Nathan and had seen his car parked in front of her apartment. However, no one answered the door. On this occasion, mother stepped out of the apartment and denied Nathan was inside. Nathan, however, exited the apartment after the probation officer called into the apartment and told him to come out. Nathan admitted having contact with mother's children on about five occasions. Mother told the social worker who responded she thought Nathan could be around her children because the case plan did not prohibit it and she thought the case plan superseded the safety plan. When the social worker asked mother why, if that was her understanding, she denied having contact with Nathan, mother cried and said she would use illicit substances or jump off a bridge if A.W. was removed from her. She also said she would have no reason to live. When the social worker asked mother how long Nathan had been there, she claimed that it was a coincidence. However, when the social worker told her his car had been seen at her apartment on numerous occasions, she stated " 'Ok, fine, he's always around.' " Nathan stated he stayed most nights at mother's apartment but spent the night with his mother when Trinity and Julius were there. As he was being placed into the sheriff's vehicle, mother told him she loved him. Later that day, mother signed a safety plan stating she would stay with her mother and have no contact with Nathan.

Jacob contacted the department, having heard of Nathan's arrest. He said he had primary custody of Trinity and Julius and mother had weekend visitation or for one week at a time when she was more stable. He said she met Christopher while in residential treatment and left treatment with him. Jacob believed mother started using methamphetamine at that time. He noticed the decline when she could not get Trinity and Julius to school on time and did not help them with their homework while they were with her. In June 2016, he was contacted early in the morning to take Trinity and Julius

after mother overdosed on methamphetamine and was taken to the emergency room. She apparently reported to hospital staff that she was using methamphetamine every day.<sup>2</sup>

On May 29, 2018, the social worker created another safety plan for mother. Mother signed the safety plan, agreeing not to allow Nathan to have any contact with A.W.

On June 5, 2018, the department filed a juvenile dependency petition on A.W.'s behalf, pursuant to section 300, subdivision (b)(1), alleging A.W. had suffered or there was a substantial risk he would suffer, serious harm or illness, as a result of mother's failure or inability to supervise or protect him adequately and by her inability to provide regular care due to her mental illness or substance abuse. As factual support, the department cited mother's positive methamphetamine results on February 6, 2018, at 36 weeks gestation and hospitalization for preeclampsia, her agreement on February 14, 2018, not to allow Nathan contact with A.W. and Nathan's arrest at her apartment on May 24, 2018, and her admission he was " 'always around.' " The petition identified Christopher as A.W.'s alleged father. It indicated A.W. had not been detained.

The juvenile court found prima facie evidence A.W. was a minor described under section 300, subdivision (b)(1) and set a contested jurisdictional hearing at mother's request. Minor's counsel expressed his "extreme" concern regarding Nathan's presence in the home, mother's consistent dishonesty and co-dependent relationship with Nathan and questioned why the department was not seeking detention. Mother's attorney argued there was no risk to A.W. because the terms of Nathan's probation did not forbid contact with a male infant. The court was also concerned and advised mother she should make every effort to prevent any contact between Nathan and A.W.

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<sup>2</sup> The emergency room physician who dictated the emergency room report stated, "Apparently reported that she's been doing methamphetamines every day and today she did it one too many times."

In its jurisdictional report, the department recommended the juvenile court find the allegations in the petition true and allow A.W. to remain in mother's custody. Mother had been participating in random drug testing and the results were negative, except one positive result for a prescribed opiate. The department was concerned, however, about Nathan's presence in her home. Even though his offense involved juvenile females, the department discovered a study of incarcerated crossover sexual offenders who reported they did not restrict themselves to a preferred victim type. In its jurisdictional report, the department cited the journal and article in which the study was published.

The juvenile court convened the contested jurisdictional hearing in July 2018. Mother's attorney objected on hearsay grounds to the department's reference in its jurisdictional report to the article on sexual offenders. The juvenile court overruled the objection, stating it would give the article the appropriate weight. Minor's counsel called the Tuolumne County District Attorney's Office chief investigator Jeffrey Snyder to testify about four telephone conversations between mother and Nathan recorded on the jail recording system while he was in custody on June 12 and 16, 2018. The court admitted a disc containing a recording of the phone calls and a text document reflecting communications between mother and Nathan. Over objections from mother's attorney, the audio recordings of the calls were played in the courtroom.

Mother's attorney called probation officer Anthony Johnson to testify about Nathan's postrelease community supervision (PRCS) after being released from state prison stemming from his child pornography conviction and violation of probation. Johnson testified the special conditions of Nathan's PRCS prohibited him from having contact with a female under the age of 18 without a responsible adult over 21 being present and approved by the probation officer in advance but there were no special conditions concerning minor males. Johnson also read from a court-ordered evaluation prepared by Dr. Cavanaugh in which Cavanaugh stated he saw " 'no risk whatsoever with male children living in [Nathan's] residence.' "

Social worker Cassandra LaFon testified the department considered the study on crossover sexual offenders in assessing the case. She conceded the study did not include offenders that were charged with child pornography. She believed Nathan's sex offender status and child pornography offense placed A.W. at risk and found it significant that Nathan was not allowed to reunify with his own son. The department was also concerned that mother's poor choice in allowing Nathan around her daughter and dishonesty about it indicated she would not protect A.W.

The juvenile court sustained the dependency petition in its entirety, finding both counts under section 300, subdivision (b)(1) true. The court found mother's history of methamphetamine use, including her overdose in 2016, and her use while pregnant combined with her mental illness placed A.W. at a substantial risk of harm. As to the allegation concerning exposure to Nathan, the court stated it read and considered the study on crossover sexual offenders but did not find it particularly helpful. However, other factors led the court to conclude the allegation was proven by a preponderance of the evidence, namely mother's violation of her safety plan, her exposure of her minor daughter to a registered sex offender, her dishonesty with the probation officer and her unstable mental health. The court stated it reviewed Dr. Cavanaugh's report, but after weighing the evidence concluded, "[t]here's a risk ... despite what Dr. Cavanaugh said, and I think the risk is exacerbated by [mother's] lack of judgment, her lack of honesty with the social workers, and I think all ... those circumstances justify the [c]ourt's findings in this case."

After sustaining the allegations, the juvenile court set the matter for disposition on September 11, 2018. The court ordered no contact between Nathan and A.W. pending its disposition of the case.

On August 31, 2018, the social worker met with mother to discuss the family maintenance plan. Mother stated she had adopted a " 'cautious but not worried' " attitude toward Nathan's contact with her children. He had been transparent about his sex



offender status and she did not believe he would harm her children. She had not had regular contact with him pending the dispositional hearing because of the court's order. As for her history of methamphetamine use, she said the social workers misunderstood her statement that she used methamphetamine once or twice a week while in a relationship with Christopher. She clarified that she used once or twice during the entire time she was in that relationship. Regarding her overdose, she said it occurred because she did not know how much to use because she had not regularly consumed it before. Since the overdose, she only used once and that was when she was pregnant with A.W.

In its dispositional report, the department recommended the juvenile court declare A.W. a dependent child and order that he remain in mother's custody with family maintenance services, requiring her to participate in mental health counseling, medically manage her mental illness, submit to random drug testing and attend AA/NA meetings. It recommended the court not offer Christopher reunification services because he was an alleged father and not entitled to them.<sup>3</sup>

The initial dispositional hearing was continued. At the subsequent dispositional hearing on September 18, 2018, the juvenile court set the matter for a contested dispositional hearing at mother's request. After setting the hearing, the court stated mother's relationship with Nathan was a problem, explaining it was very familiar with him and his substance abuse. The court stated Nathan had a significant heroin problem, reiterating "I mean significant heroin problem."

Probation officer Anthony Johnson and social worker Cassandra Lafon testified at the contested dispositional hearing on October 11, 2018. Johnson testified Nathan was not being regularly tested for drugs and alcohol. He last tested positive in October 2015 for benzodiazepines and may have had a prescription at that time that would account for

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<sup>3</sup> The department attempted but was not able to locate Christopher. Consequently, he never appeared in the proceedings to elevate his paternity status.

the positive result. Since then, he tested five times for probation. There was nothing in Johnson's report that indicated he used drugs in the prior two and a half years. Nathan told Johnson he had a history of alcohol abuse but not drug abuse as far as Johnson could remember. Nathan admitted being around a minor female. His PRCS was revoked, reinstated and modified to include 180 days on an electronic monitor. He was no longer being monitored.

LaFon testified mother drug tested 29 times with negative results. However, her insight into the potential risk Nathan posed to her children was no better than it was at the jurisdictional hearing. She maintained there was no risk. LaFon did not believe a voluntary case plan would suffice to protect A.W., explaining mother had already attempted it.

County counsel argued mother's circumstances remained "virtually unchanged" since the juvenile court sustained the petition and court supervision was still required. Minor's counsel concurred. Mother's attorney argued the conditions justifying juvenile court intervention no longer existed because mother was sober and engaging in services. Counsel also argued there was a lack of specificity regarding the risk posed by Nathan and asked the court to dismiss the petition.

The juvenile court found there was sufficient risk based on mother's substance abuse alone to exercise its dependency jurisdiction. The court cited mother's use of methamphetamine while eight months pregnant, knowing it would harm her baby and put A.W. at "huge risk." The court also believed mother downplayed the significance of her methamphetamine abuse history. As to the risk posed by Nathan, the court stated it was concerned about the risk he presented to A.W. but believed any discussion about sex offenders and their predilections was "beyond this case." However, the court continued, "[Nathan] is a 290 registrant for a reason. He does represent a risk to children.... [H]e represents a risk to A.W. I am confident of that. I'm sure of that."

The juvenile court adjudged A.W. a dependent child of the court, returned him to mother's custody, ordered her to comply with the family maintenance case plan and set an in-home status review hearing for April 9, 2019. The court took judicial notice of Nathan's previous dependency and felony criminal matters and ordered Nathan to have no contact with A.W. during the pendency of the case.

### **DISCUSSION**

A child may be adjudged a dependent of the juvenile court under section 300, subdivision (b)(1), as relevant here, "if the 'child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent ... to adequately supervise or protect the child.' " A true finding under this subdivision requires evidence of " ' ' ' "serious physical harm or illness" to the [child], or "a substantial risk" of such harm or illness.' " ' " (*In re D.L.* (2018) 22 Cal.App.5th 1142, 1146 (*D.L.*)). Proof of this element " ' ' "effectively requires a showing that at the time of the jurisdictional hearing the child is at substantial risk of serious physical harm in the future ...." ' " (*Ibid.*, italics omitted, quoting *In re B.T.* (2011) 193 Cal.App.4th 685, 692.) "Evidence of past conduct may be probative of current conditions." (*In re D.L.*, at p. 1146.) "To establish a defined risk of harm at the time of the hearing, there 'must be some reason beyond mere speculation to believe the alleged conduct will recur.' " (*Id.*, quoting *In re James R.* (2009) 176 Cal.App.4th 129, 135–136, abrogated in part on another ground in *In re R.T.* (2015) 235 Cal.App.4th 795.)

"In considering a claim of insufficient evidence to support a jurisdictional finding, we review the evidence most favorably to the court's order—drawing every reasonable inference and resolving all conflicts in favor of the prevailing party—to determine if it is supported by substantial evidence. [Citation.] If it is, we affirm the order even if other evidence supports a contrary conclusion. [Citation.] [¶] We note that in dependency proceedings, the child welfare agency must prove by a preponderance of the evidence that the child who is the subject of the petition comes under the court's jurisdiction.

[Citations.] On appeal, the parent has the burden of showing there is insufficient evidence to support the order.” (*In re N.M.* (2011) 197 Cal.App.4th 159, 168.)

Mother contends the juvenile court’s jurisdictional findings were error because there was no defined risk presented by her substance abuse, mental illness or relationship with Nathan. She argues she was addressing her substance abuse and mental illness and that Nathan did not pose any risk to male children as evidenced by Dr. Cavanaugh’s opinion and the absence of a probation condition prohibiting it. We disagree with mother’s contention that the evidence does not support a defined risk under the statute.

The defined risk mother posed was that her depression would cause her to abuse substances, which in turn would endanger A.W. According to the emergency room record of mother’s June 2016 overdose, she reported being depressed for the prior week. The weekend before she attempted to overdose by taking an over-the-counter pain medication. When she tested positive on February 6, 2018, she said she took methamphetamine because she “did not want to feel anything.” The juvenile court could infer from this evidence mother’s feelings of depression placed A.W. at risk because it precipitated her drug abuse. The court could also infer that the risk mother posed existed at the jurisdictional hearing. Even though mother was testing negative for drugs and treating her mental illness, she was not honest about her drug use history. She attempted to minimize her drug use by stating the social workers misunderstood her original statement that she used methamphetamine once or twice a week during her relationship with Christopher, claiming instead that she used it once or twice during the entire relationship. Her refusal or inability to be honest about her drug use only added to the risk she posed to A.W. because it signified she may not seek help but hide or minimize it instead. For these reasons alone, substantial evidence supports the court’s jurisdictional finding A.W. was a child described by section 300, subdivision (b)(1).<sup>4</sup> Since a single

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<sup>4</sup> In refuting the juvenile court’s jurisdictional finding, mother raises the “tender years” presumption and argues it applied but she rebutted it. We disagree that it applies.

jurisdictional finding supported by substantial evidence is sufficient to support jurisdiction, we need not address whether permitting Nathan to have contact with A.W. placed A.W. at a substantial risk of harm under the statute. (*Drake M.*, *supra*, 211 Cal.App.4th at p. 762.)

Alternatively, mother contends the juvenile court erred in not dismissing the petition because A.W. no longer required the court's protection. She contends there was no additional evidence of risk other than that asserted at jurisdiction (i.e., her substance abuse and mental health history and risk from Nathan) and she was already participating in and complying with the services she would be receiving under family maintenance. We concur dismissal is required in the absence of continuing risk. However, the court found A.W. was still at risk of harm and the record supports it.

Once the juvenile court finds a basis to assume jurisdiction, it is required to hear evidence on the question of the proper disposition for the child. (§ 358, subd. (a).) "Typically, once the child has been adjudged to be a dependent child pursuant to section 360, subdivision (d),<sup>5</sup> the juvenile court determines what services the child and the family need to be reunited and free from court supervision." (*In re Destiny D.* (2017) 15 Cal.App.5th 197, 205.)

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The "tender years" presumption acknowledges that children of tender years are inherently at a substantial risk of harm by parental substance abuse and the attendant failure to provide adequate care and supervision. Thus, a juvenile court's "finding of substance abuse is prima facie evidence of the inability of a parent ... to provide regular care resulting in a substantial risk of harm." (*In re Drake M.* (2012) 211 Cal.App.4th 754, 767 (*Drake M.*)). However, the presumption applies where there is ongoing substance use. (*Id.* at p. 763 [father was a " 'current user of legal marijuana' "]). Although A.W. was clearly of "tender years," mother was by all accounts abstinent at the time of the jurisdictional hearing. Further, as mother points out, the juvenile court did not rely on the presumption. Consequently, we need not address it.

<sup>5</sup> Section 360, subdivision (d) provides: "If the court finds that the child is a person described by Section 300, it may order and adjudge the child to be a dependent child of the court."

The juvenile court's dispositional options range from dismissing the petition to removing the child from parental custody. (Cal. Rules of Court, rule 5.695(a).) "Apart from the statutory limitation on its authority to remove a child from a custodial parent with whom the child was residing at the time the dependency petition was filed (see § 361, subd. (c)),<sup>6</sup> the juvenile court enjoys wide discretion to make any orders necessary to protect the dependent child (§ 361, subd. (a)), including 'all reasonable orders for the care, supervision, custody, conduct, maintenance, and support of the child.' (§ 362, subd. (a)) and those orders directed to the parents of a dependent child that it 'deems necessary and proper for the best interests of or for rehabilitation of the minor' (§ 245.5). That authority necessarily includes, in an appropriate circumstance, discretion to terminate dependency jurisdiction when the child is in parental custody and no protective issue remains." (*In re Destiny D.*, *supra*, 15 Cal.App.5th at p. 207.)

In order to dismiss the case at disposition, as mother argues was required, the juvenile court had to find that the risk of harm on which it took jurisdiction no longer existed. However, that is not what the court found. The court found that A.W. was at significant risk because of mother's substance abuse. It stated, "She [clearly has] a substance abuse issue in her life. The fact that she used while pregnant indicates to the [c]ourt that [A.W.] is still at risk from her substance abuse, and [the court] should maintain jurisdiction on that ground[] alone and will maintain jurisdiction. [¶] I want to make sure that [A.W.] is safe."

Having concluded A.W. required continued supervision, the juvenile court opted to declare dependency, permit A.W. to remain at home and order family maintenance services. (Cal. Rules of Court, rule 5.695(a)(5).) Because the court's dispositional order

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<sup>6</sup> The juvenile court may not remove a child from the physical custody of a parent with whom the child resided at the time the dependency petition was initiated unless the court finds clear and convincing evidence of any one of the circumstances set forth in section 361, subdivision (c).

did not involve an out-of-home placement, it only required the court to find by a preponderance of the evidence that a continuing risk of harm to A.W. existed. (*In re Jennifer V.* (1988) 197 Cal.App.3d 1206, 1210.) We conclude substantial evidence supports the juvenile court's assessment of the risk and its decision to implement protective measures for all the reasons we have discussed.

#### **DISPOSITION**

The judgment is affirmed.